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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

HAWAII LEASEHOLDERS EQUITY COALITION
a Hawaii non-profit corporation,

Cross-Petitioner,

vs.

SMALL LANDOWNERS OF OAHU, and RICHARD S. H. WONG, OSWALD K. STENDER, MARION M.L. LINDSEY, GERARD A. JERVIS, and HENRY H. PETERS, in their capacities as Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

HAWAII LEASEHOLDERS EQUITY COALITION'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a rent control provision enacted by a municipality which satisfies the stated objective of protecting present owner occupants from excessive renegotiated rent be invalidated as a regulatory taking due to the failure to "monetize" the alleged rent control "premium" and pay said premium to the lessor.

2. Is the rational basis test the proper standard of review for a rent control ordinance enacted by a municipal government which satisfies the stated objectives of the legislative body.

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Ninth Circuit whose judgment is sought to be reviewed herein are as follows:

City and County of Honolulu, Hawaii

Hawaii Leaseholders Equity Coalition ("HALE Coalition")

Small Landowners of Oahu

Gerard A. Jervis, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Marion M.L. Lindsey, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Henry R. Peters, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

William S. Richardson, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Oswald K. Stender, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Matsuo Takabuki, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Myron B. Thompson, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

Richard S.H. Wong, as Trustee of the Kamehameha Schools Bernice Pauahi Bishop Estate

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent/Cross-Petitioner states the following:

Respondent/Cross-Petitioner Hawaii Leaseholders Equity Coalition ("HALE Coalition") is a Hawaii non-profit corporation that has no corporate parents or wholly-owned subsidiaries.

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HAWAII LEASEHOLDERS EQUITY COALITION'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner, Hawaii Leaseholders Equity Coalition ("HALE Coalition"), respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, *Richardson v. City and County of Honolulu*, is reported at 124 F.3d 1150 (9th Cir. 1997) (attached as Appendix A at C.Pet.App. 1a to 46a). The opinions of the District Court deciding the constitutional challenge to the City and County of Honolulu's leasehold conversion and rent control ordinances and whose judgments were reviewed on a consolidated basis by the Court of Appeals are *Richardson v. City and County of Honolulu*, reported at 802 F.Supp. 326 (D.Haw.1992) (Ezra, D.J.) (hereinafter "Richardson") (attached as Appendix B at C.Pet.App. 47a to 96a) and *Small Landowners of Oahu v. City and County of Honolulu* reported at 832 F.Supp. 1404 (D.Haw.1993) (Fong, D.J.) (hereinafter "Small Landowners") (attached as Appendix C at C.Pet.App. 97a to 116a.)[1]

[1] Cross-Petitioner's Appendix is hereinafter cited as "C.Pet.App. ___".

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its judgment and opinion on September 8, 1997. The Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate (hereinafter "Bishop Estate") timely filed a petition for rehearing and suggestion for rehearing en banc on September 18, 1997 to rehear the validation of Ordinance 91-95. The Court of Appeals denied the Bishop Estate's petition for rehearing on March 6, 1998.

The Small Landowners of Oahu ("Small Landowners") and the Bishop Estate filed a Petition for a Writ of Certiorari on June 3, 1998.

The HALE Coalition now files this Conditional Cross-Petition for a Writ of Certiorari pursuant to Supreme Court Rule 12.5.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment provides:

> [N]or shall private property be taken for public use without compensation.

United States Constitution, Amendment V.

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[2] Supreme Court Rule 12.5 provides:

"No more than 30 days after a case has been placed on the docket, a respondent seeking to file a conditional cross-petition (i.e., a cross-petition that otherwise would be untimely) shall file, with proof of service as required by Rule 29."

The statutory provision involved is Honolulu City and County Ordinance No. 91-96 (December 18, 1991). Reproduced as Appendix D at C.Pet.App. 117a to 145a.

STATEMENT OF CASE

I. BACKGROUND

This Cross-Petition involves a Honolulu City and County Ordinance, Ordinance 91-96, which imposes a ceiling on renegotiated lease rents for ground leases of owner-occupied residential condominiums in Honolulu. In enacting Ordinance 91-96, a companion enactment with Ordinance 91-95, the leasehold conversion ordinance,[3] the Honolulu City Council found that almost 65% of the residential condominiums were on leased land and the residential leasehold-system had several undesirable effects, including lease rent increases during rent renegotiations of up to 1000% over the rent for the previous period. Given the inequality of bargaining power between the ground lessors and the lessee-apartment owners, the increased rent required lessees to (a) pay the renegotiated rent, or (b) if the renegotiated rent could not be paid, surrender their apartments without compensation to the ground lessors and thereby force the apartment owners to look for alternative accommodations in an inflationary housing market.

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[3] Ordinance 91-95 is the subject of a petition for a writ of certiorari filed on June 3, 1998 by the Bishop Estate and the Small Landowners of Oahu.

The stated purpose of Ordinance 91-96 was to set maximum renegotiated ground lease rents which were affordable for the owner-occupants of condominiums and fair to the lessors. Ordinance 91-96 applied to all leases that contained provisions for the renegotiation of lease rents for owner-occupied condominium units.

Under the Ordinance, the maximum annual renegotiated lease rent was calculated by multiplying the initial lease rent by a rent factor, Ordinance § 1.5(b) at C.Pet.App. 129a. The "initial lease rent" was the greater of the beginning lease rent stipulated in the lease or the reasonable market value rent prevailing at the effective date of the lease. Ordinance § 1.1 at C.Pet.App. 123a-124a.

The multiplier, the "rent factor," was the average consumer price index ("CPI") for the six-month period in which the rent renegotiations occurred divided by the average CPI in effect at the time of the effective date of the initial lease rent. Ordinance § 1.5(b) at C.Pet.App. 129a.

Ordinance 91-96 encouraged the ground lessor and the owner-occupants to reach a voluntary agreement as to the renegotiated rent. § 1.4(b) at C.Pet.App. 127a-128a. Only if the parties were unable to reach an agreement on the renegotiated rent would they be required to proceed to arbitration.[4]

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[4] If the ground lease is subject to § 516D-12, Haw.Rev.Stat., the arbitration must proceed pursuant to Chapter 516D, Haw.Rev.Stat. If the lease renegotiations are not subject to the provisions of Chapter 516D, Haw.Rev.Stat., then the lease rent arbitration is conducted by the Honolulu Department of Housing and Community Development ("Department").

Ordinance 91-96 also provided a method for adjusting the renegotiated lease rent periodically to account for changes in the CPI. Ordinance § 1.6 at C.Pet.App. 130a. Under certain circumstances, Ordinance 91-96 allowed for an administrative adjustment of the renegotiated lease rent to an amount higher than the maximum annual renegotiated lease rent. Ordinance § 1.7 at C.Pet.App. 132a.[5]

After passage of Ordinance 91-96, the Bishop Estate instituted a facial challenge to the Ordinance. The District Court in *Richardson* declared Ordinance 91-96 unconstitutional.

The District Court analyzed Ordinance 91-96 in the context of various local municipal rent control ordinances and mobile home park ordinances.

Rent Control Ordinances.

The District Court in *Richardson* noted that recent cases had upheld rent control ordinances which provided for some degree of individualized consideration, citing *Pennell v. City of San Jose*, 485 U.S. 1 (1988)[6] and

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[5] A lessor may petition the Department for an administrative adjustment when the lessor pays the operating expenses from lease rent proceeds and the lessor's current net operating income is less than the lessor's net operating income in the last year of the fixed rent period, § 1.7(c) at C.Pet.App. 135a. Other provisions allow for an adjustment.

[6] When a tenant objected to a landlord's proposed rent increase, a hearing officer would determine the reasonableness of the proposed increase. The San Jose ordinance, according to the *Richardson* court, required an officer to examine the history

Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 550 P.2d 1001 (1976).[7]

Mobile Home Park Ordinances.

The *Richardson* court also analyzed Ordinance 91-96 in the context of the mobile home rent control cases including *Yee v. City of Escondido*, 503 U.S. 519 (1992). *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991, opinion withdrawn on other grounds, 973 F.3d 704 (9th Cir. 1992) and *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988).

The District Court in *Richardson* found that Ordinance 91-96 allowed the lessee/owner-occupant to charge a premium in connection with the sale of the apartment unit with a below market lease rent, thereby transferring wealth from the ground lessor to the lessee/owner-occupant. The *Richardson* court concluded that the availability of the premium based on the future sale of the apartment unit subject to Ordinance 91-96 and the purported transfer of wealth from the lessor to the lessee/owner-occupant under Ordinance 91-96 violated the takings clause.[8]

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of the premises, the landlord's costs and the market for comparable housing and allow the landlord to present any relevant financial information relating to the property.

[7] The municipal ordinance provided that the landlord could petition the rent control board for a rent adjustment.

[8] The Small Landowners case did not address Ordinance 91-96.

On appeal, the Court of Appeals affirmed the District Court's ruling invalidating Ordinance 91-96, but on a somewhat different theory.

The Court of Appeals recognized that land regulations influenced the value of the property, but to be constitutional, the regulation had to

> "do so in a manner that substantially further[ed] a legitimate government interest".

124 F.3d at 1165 C.Pet.App. 35a.

The Court of Appeals found that Ordinance 91-96 regulated the use of the lessor's property interests in a manner that did not substantially further the goal of creating affordable housing.

> "The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing in Honolulu. Incumbent owner-occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium. The price of housing ultimately will remain the same. The Ordinance thus effects a regulatory taking."

124 F.3d at 1166 C.Pet.App. 35a.

On June 3, 1998, the Bishop Estate filed a Petition for a Writ of Certiorari requesting a review of the Court of Appeals' decision upholding the constitutionality of City and County of Honolulu Ordinance 91-95. Pursuant to

the Rules of the Supreme Court, Rule 12.5, HALE Coalition now files this conditional cross-petition for a review of the invalidation of Ordinance 91-96, on the ground that the Court of Appeals erred in holding that Ordinance 91-96 would not "substantially further [the] goal of creating affordable housing in Honolulu" and thereby effected a regulatory taking.

According to the Court of Appeals, Ordinance 91-96 would not further the goal of creating affordable owner-occupied housing in Honolulu because the

> "[i]ncumbent owner-occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium. The price of housing ultimately will remain the same."

The HALE Coalition believes that both the District Court in *Richardson* and the Court of Appeals erred in ruling that Ordinance 91-96 was unconstitutional because said Ordinance failed to accomplish the goal of providing affordable housing in Honolulu despite a finding to the contrary by the Honolulu City Council.

II. REASONS FOR GRANTING THE CROSS-PETITION FOR A WRIT OF CERTIORARI

Ordinance 91-96 as Written Will Accomplish the Stated Purposes of Creating Affordable Housing for the Present Owner-Occupants and Satisfies the Public Use Requirement of the United States Constitution

The Court of Appeals invalidated Ordinance 91-96 on the ground that the ordinance would not accomplish its

objective of creating affordable condominium housing in the City of Honolulu because the second generation owners might have to pay a "premium" to the original owner-occupants of the rent-controlled units in order to purchase an apartment in a rent-controlled condominium.[9]

The Court of Appeals surmised that Ordinance 91-96 would not accomplish the purpose of creating affordable housing because a lessee in a rent controlled condominium, the present owner-occupant, could pass on to purchasers of their apartments, the benefits of living in a rent-controlled apartment and that "premium" could be "sold" to the second-generation of apartment owners. Thus, the rent-control ordinance would not create a larger pool of affordable condominium units because the present owner-occupant could exact a higher price from the future purchasers.

The HALE Coalition notes that the findings of the Honolulu City Council show that the purpose of Ordinance 91-96 was to prevent a present housing crisis created when the existing apartment-owners facing rent renegotiations after up to 20 to 25 years of original rent, could not afford to pay the renegotiated lease rents, would be forced to surrender the apartment units to the ground lessor, without compensation, and look for alternative housing in a highly inflationary housing market.

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[9] By second-generation effect is meant the effect of Ordinance 91-96 on those persons who purchase their apartments from the owner-occupants who occupied the units when the ordinance-controlled rent was renegotiated.

The Honolulu City Council found that some renegotiated rents to apartment-owners were up to 1000% over the rent charged in the original rental period. The owner-occupant had the option of (1) paying the renegotiated rent, or (2) abandoning the apartment, surrendering it to the lessor without compensation and finding new housing in a highly-inflationary housing market, thereby creating a potential housing crisis and destabilizing the Oahu economy. Ordinance 91-96 § 1 at C.Pet.App. 117a to 122a.

In Hawaii, a resident will purchase an apartment in a condominium where the ground lease is owned by a different party. Due to Hawaii's unique land ownership system, the apartment owner has title to the apartment unit but must pay lease rent to the owner of the ground for the entire term of apartment ownership. These ground leases are negotiated for long periods of time, and when the initial rent period expires, the ground lessor is often able to establish a new renegotiated ground rent for the next period in some cases as much as 1000% over the previous ground lease rent.[10] If the apartment owner cannot pay the renegotiated rent, the apartment owner might have to abandon the apartment to the ground lessor, dispossessing the owner-occupant, which the Honolulu City Council found would create a housing crisis.

One response to this crisis of rent renegotiations was the enactment of Ordinance 91-95, which provides a

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[10] In *Small Landowners of Oahu*, 832 F.Supp. at 1410, n.4, one witness testified at the Honolulu City Council hearings that the lease rent at one condominium increased 8000%. C.Pet.App. 109a.

group of apartment owners in a condominium with a procedure to purchase at the fair market value the leased fee interest from the ground lessor as an alternative to paying the renegotiated rent.

For those apartment owners who could not afford to purchase the ground lease pursuant to Ordinance 91-95, or for those whose projects could not qualify for Ordinance 91-95, the apartment owners might have no alternative but to pay the renegotiated rent or surrender the unit to the ground lessor.

Ordinance 91-95 was enacted to allow eligible apartment owners who could afford to purchase the lease fee to purchase the fee, voluntarily, but by eminent domain if the ground lessor refused to voluntarily sell the leased fee interest, while Ordinance 91-96 was enacted for apartment owners who either could not afford to purchase the lease fee or for condominium projects which could not qualify for purchase under the Ordinance 91-95.

The Court of Appeals in invalidating Ordinance 91-96 disregarded the stated purpose of Ordinance 91-96, protecting the present owner-occupants of condominium apartments who could not afford the renegotiated rent. Ordinance 91-96 is an attempt to give the ground lessor a reasonable return on their land investment, without forcing the apartment owner to pay an extortionate renegotiated rent in order to preserve the value they have invested in their apartment units.

The Circuit Court of Appeals, despite the stated purpose of Ordinance 91-96 of avoiding a present housing crisis created by dispossessing apartment owners unable to pay the renegotiated rent, invalidated Ordinance 91-96

because of the second-generation effects, the alleged enhanced value that the present owner-occupants could pass on to their purchasers, which would, purportedly, in the long-term frustrate the Ordinance's stated objective of creating affordable housing.

According to the Court of Appeals, Ordinance 91-96 constituted a regulatory taking because future purchasers of rent-controlled condominium units might have to pay a premium to the present owner-occupant due to the advantages of being in a rent-controlled condominium unit and this premium accruing to the present owner-occupants, would drive up the price of the apartments and frustrate the ostensible purpose of the Ordinance, expanding the pool of affordable housing units in Honolulu.

The HALE Coalition believes that the Court of Appeals erred in focusing on the second-generation effects, i.e., the purported premium that future purchasers would have to pay present owner-occupants for the advantage of living in a rent-controlled condominium unit and failed to accept the stated purpose of Ordinance 91-96 to avoid imposing renegotiated rents of up to 1000% over the initial rent period, forcing the present owner-occupants to accept the renegotiated rent or surrender the apartment to the lessor and face possible dispossession during a housing crisis. This potential wide-scale dispossession of long-term residents would, according to the Honolulu City Council, destabilize the Oahu economy.

The Court of Appeals in invalidating Ordinance 91-96 for the first time imposes a new requirement on a

governmental body which exercises the right of eminent domain by requiring that the present ground lessor not only receive an amount which satisfies the constitutional requirement of "just compensation," but the City Council has to insure against the present owner-occupant from receiving some speculative and unquantifiable financial benefit from the rent control ordinance, possibly several years after the renegotiations.

The Court of Appeals invalidated Ordinance 91-96 on the ground that the potential "premium" which the present owner-occupants might exact from future purchasers of the units would tend to inflate housing costs and not expand the pool of affordable housing in Honolulu.

The HALE Coalition has two responses to the Court of Appeals analysis that Ordinance 91-96 is an unconstitutional regulatory taking because it fails to create a pool of affordable housing due to the possibility that present owner-occupants could exact a premium from future purchasers for living in a rent controlled project. First, the so-called "economic analysis" set forth in the Court of Appeals opinion at 124 F.3d at 1164-65 C.Pet.App. 32a to 33a, was not the subject of any evidentiary hearing. The Bishop Estate challenged Ordinance 91-96 on its face and the District Court in *Richardson* decided the issue by way of summary judgment. There was no fact-finding or empirical study to show what, if any, premium effect there would be from the sale by the present owner-occupants of rent controlled units to future purchasers.[11]

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[11] Ordinance 91-96, like Ordinance 91-95, was challenged on its face and without the benefit of a full evidentiary hearing

The closest analogy, but not strictly equivalent to the condominium apartment owner, is the mobile home owner.[12] In the several cases where a local municipality enacted a "rent control" ordinance for mobile home parks, there has been conflicting opinion regarding the existence of a "premium" for the rent controlled space,

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which would have established (1) the existence of a "premium," and (2) the interactive effects of Ordinance 91-95 and Ordinance 91-96.

Ordinance 91-95 was designed to unite the ownership of apartments in a condominium project with the ground lease interest, so that an apartment owner could sell the apartment and its proportionate share of the land beneath the condominium project. This would, according to the Honolulu City Council, correct a failure in the real estate market, making apartment units in leased projects less desirable than units in fee simple condominium projects.

If and when Ordinance 91-95 and 91-96 became operative, the Honolulu resident could opt for the purchase of a fee simple condominium or the purchase of a unit in a rent-controlled project. The interaction of Ordinances 91-95 and 91-96 would create a new heretofore unseen dynamic in the Honolulu housing market. Under these circumstances, there is no assurance that there would be any "premium" for occupying a rent controlled unit as opposed to purchasing a fee simple unit, and if there was a "premium" for rent controlled units, the size of the premium and its impact on the pool of affordable housing.

[12] Although the mobile home, like a condominium apartment, is virtually permanent, if the rent in a mobile home park is so extreme, it might be possible for a mobile home owner to detach the mobile home and move it to a new location. A condominium unit is fixed and the apartment owner, who cannot afford the renegotiated rent must surrender the unit to the ground lessor or sell it for below market because of the inflated renegotiated rent.

and, if there was a "premium," the constitutional effect of failing to pass said premium on to the mobile home park owner.

The Court of Appeals in *Richardson* cited to *Azul Pacifico, Inc. v. City of Los Angeles, supra,* and *Hall v. City of Santa Barbara, supra,* for the proposition that a rent-control premium exists.

Other courts have rejected the notion of a "premium," in the context of rent control ordinances for mobile home trailer parks. In *Yee v. City of Escondido,* 274 Cal.Rptr. 551 at 555, 224 Cal.App.3d 1349 (Cal.App.4th 1990), [see 503 U.S. 519 (1992)] and *Casella v. City of Morgan Hill,* 280 Cal.Rptr. 876, 881-84, 230 Cal.App.3d 43 (Cal.App.6thDist. 1991), the state courts noted that the *Hall v. City of Santa Barbara* court failed to explain why the existing tenants' ability to "monetize" the future rent control savings and recapture it from later tenants when the mobile home space was sold was critical to the takings analysis.[13]

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[13] The state court in *Yee* addressed the "monetization" argument and the furtherance of the public objective of the mobile home ordinance.

As to the "regulatory takings" argument for the "monetized" rent controlled premium, the *Yee* court noted that:

> "Moreover, *Hall* fails to explain why the existing tenant's ability to "monetize" the future rent control savings and recapture it from later tenants when the mobile home (is sold) is somehow critical to the takings analysis. (See Manheim, *Tenant Eviction Protection and the Takings Clause* 1989 Wis.L.Rev. 925, 969. Fn. 237.) If an owner's property has been taken by the government, it should be of no constitutional

The Court of Appeals' conclusion that the existence of a "premium" is of any constitutional concern is still a matter of controversy in the case law. So long as the ground lessor receives a reasonable rent, it is of no constitutional consequence if the later disposition of the apartment, possibly years after the rent renegotiations, yields a premium to the owner-occupant.

The Court of Appeals also erred in its conclusion that Ordinance 91-96 did not achieve the objective of creating a pool of affordable housing because the present owner-occupant, who renegotiates the rent, could charge a "premium" to a future purchaser and the enhanced price for the rent-controlled apartment would not expand the pool of affordable housing in Honolulu.[14]

> consequence to whom the property has been given. Compare, for instance, a residential rent control ordinance which does not allow rent increases simply because the tenant vacates the rental unit. Similar ordinances have repeatedly withstood challenges alleging facial unconstitutionality. (See, e.g., *Fisher v. City of Berkeley* (1984), 37 Cal.3d 644, 209 Cal.Rptr. 682, 693 P.2d 261, app. dism. 471 U.S. 1124, 105 S.Ct. 2653, 86 L.Ed.2d 270; *Hutton Park Gardens v. Town Council* (1975), 68 N.J. 543, 350 A.2d 1.) In such a case, the economic benefit of the ordinance is spread among all succeeding tenants. In this case, of course, plaintiffs and the *Hall* court would assert that the benefit of the ordinance is limited to those mobile home tenants renting spaces at the time the ordinance is enacted. In both cases, however, the value "taken" from the property owner is conceptually identical.

274 Cal.Rptr. at 555-56.

[14] As to the stated purpose of using the cap on renegotiated rents in order to promote affordable housing, in another

The Court of Appeals failed to recognize that the stated purpose of Ordinance 91-96 was to protect the present long-term residents, who had spent large sums of money to purchase their apartments, and now, during the rent renegotiations, were confronted with new rent which could be as much as 1000% of the old rent, in addition to owing payments on the apartment unit itself.

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context, the state court in *Yee* addressed the issue of judicially reviewing the purposes of the rent control legislation as a revival of the discredited "substantive due process" review of legislation by a court.

> "It may be that what really underlies the *Hall* result is the court's doubt that mobile home rent control rationally furthers a legitimate governmental purpose. (See 833 F.2d at pp. 1280-1281). This same concern has been voiced by a set of sympathetic commentators who question whether rent control does anything to alleviate the shortage of available mobile homes or lessen the total economic burden on mobile home park tenants. (Hirsch & Hirsch, [*Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*], 35 UCLA L.Rev. [399] at pp. 461-463 [1988].) While portions of the Supreme Court's takings jurisprudence have their origins in notions of substantive due process, *Hall*'s resurrection of a *Lochner*-type analysis (see *Lochner v. New York* (1905), 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937) has been criticized as inconsistent with the modern Court's deferential view of the nexus between legitimate governmental purposes and chosen legislative means. (Manheim, [*Tenant Eviction Protection and the Takings Clause*] 1989 Wis.L.Rev. [925] at p. 938, fn. 86, 948-950; *Hall, supra*, 833 F.2d at p. 1284 (Schroeder, J. dis. from den. of rhg. en banc).)

274 Cal.Rptr. at 556, n.8.

The Court of Appeals seems to require that the legislative body must not only realize its primary purpose for the legislation, as in Ordinance 91-96, to protect the present owner-occupants of condominium units from dispossession because of extraordinarily high renegotiated rents; the legislative body must also consider any speculative or "windfall" benefit that the present owner-occupants may realize from the implementation of Ordinance 91-96 and the secondary effects of the legislation years after its enactment.

Since the Bishop Estate challenged Ordinance 91-96 on its face, before it was implemented, there is no way to determine the effect of the rent control provisions on the market for leased condominium units. HALE Coalition contends that the Court of Appeals should have looked at the stated purpose of Ordinance 91-96, to protect the present owner-occupants, many of whom have lived in their apartments for years, maybe decades, now living on fixed incomes, who could not afford the renegotiated rent for the next term of years. Given the consequences of being unable to pay the renegotiated rent and the possible forced surrender of the apartment unit to the ground lessor without compensation, the Honolulu City Council enacted Ordinance 91-96 to avoid the dispossession of the unit owners and a potential housing crisis. This is the purpose of Ordinance 91-96 and the Ordinance satisfies the stated objective of making renegotiated lease rents affordable for the present owner-occupants.

The Court of Appeals erred in looking beyond the immediate objectives of Ordinance 91-96, providing affordable housing for the present owner-occupants, who might not be able to afford the renegotiated rent and face

dispossession and the surrender of their apartments, without compensation, to the ground lessor. Any analysis which disregards the stated objective of Ordinance 91-96 is defective and the Court of Appeals erred in invalidating Ordinance 91-96 based on some speculative and hypothetical consequences, some of which may or may not occur years in the future. Ordinance 91-96 is a permissible exercise of the municipalities' police powers and a legitimate rent control ordinance, for the benefit of present owner-occupants of Honolulu's condominium projects.

III. CONCLUSION

Based on the error of the Ninth Circuit Court of Appeals in invalidating Ordinance 91-96, the Hawaii Leaseholders Equity Coalition respectfully requests this Court grant a conditional cross-petition for a writ of certiorari to review the Court of Appeals' opinion declaring City and County of Honolulu Ordinance 91-96 unconstitutional.

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